

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

DPP's Reference No.2 of 2001

IN THE MATTER OF A REFERENCE by the Director of Public Prosecutions under Section 17 of the Criminal Appeal Act, Chapter 113A

AND

IN THE MATTER OF THE CONVICTION OF CARMELITA DOMITA GITTENS ON INDICTMENT No.12 of the April Assizes 1982

Before: The Hon. Sir David Simmons, K.A., B.C.H., Chief Justice, the Hon. Errol DaC. Chase, Justice of Appeal, and the Hon. Colin Williams, Justice of Appeal

2002: January 25, February 15, March 25 and March 27

Mr. C. Leacock Q.C., Director of Public Prosecutions, for the applicant with Mr. Eli Edwards

Mr. Freundel Stuart and Ms. Sandra Browne for Carmelita Gittens

OPINION OF THE COURT

SIMMONS C.J.: This Reference concerns the admissibility of fresh evidence before the Court of Appeal. It is brought by the Director of Public Prosecutions under section 17 of the Criminal Appeal Act, Cap. 113A ("the Act"). In the Reference, which we have treated as an appeal in accordance with section 17(1)(a) of the Act, the Director of Public Prosecutions seeks the Opinion of this Court on 4 points of law namely:

- (i) whether the fresh evidence of DNA testing and medical evidence is admissible;
- (ii) whether the affidavit of Superintendent Morgan Greaves of the Royal Barbados Police [1] Force should be admitted as fresh evidence under section 29 of the Act;
- (iii) whether the conviction of Carmelita Domita Gittens is safe and satisfactory;
- (iv) whether the sentence of 3 years' probation imposed on Carmelita Domita Gittens ought to be set aside.

[2] The original trial in April 1982 produced the most bizarre evidence. Now almost 20 years later, a combination of equally bizarre circumstances has given rise to the need for this Court to review the verdict of a jury at the April Assizes, 1982. Carmelita Gittens ("the appellant") had been indicted for the murder of her female baby on December 15, 1981. That jury had found her Guilty of infanticide. She was placed on 3 years' probation with the condition that she receive psychiatric assistance.

[3] The notes of the trial cannot now be found, but this Court has had the benefit of the depositions taken during the preliminary inquiry and, even more importantly, the entire summation of the trial judge.

The History of the Case

[4] On December 11, 1981, about 1.45 a.m., the appellant gave birth to a female child at the Queen Elizabeth Hospital. The next day, she underwent an operation for tubal ligation (tying of the fallopian tubes). She and her baby were discharged from the hospital on December 13, 1981. She was not married, but the father of the child was a married man, one Melvin Mayers. He lived in the parish of St. Joseph whereas she lived in the parish of St. Philip.

[5] Mayers went to visit the appellant and the baby at her home in the evening of December 15, 1981. He spent about 3½ hours and left [2] about 10.10 p.m. When he left, the baby was in bed with her mother.

[6] On the very next morning, December 16, 1981, the police at District "C" station received a telephone call as a result of which Sergeant Connell (now no longer a member of the Royal Barbados Police Force) went to the appellant's home and spoke with her. The baby had disappeared. The appellant reported to Sergeant Connell that, while she was sleeping in bed with the 5-day-old infant, she felt someone leaning over her. When she awoke, she claims to have seen the back of a man leaving her bedroom with the child. She said that she did not know the man but described him as slim, dark, young and wearing a brown shirt. She told Sergeant Connell that Mayers was the last person to have visited her house on the previous night.

[7] A thorough search was made by Sergeant Connell on December 16, 1981. He found no baby. None was ever found.

[8] About 9.00 a.m. the same day, the appellant gave a statement to Station Sergeant Herbertson Arthur (now deceased). In her statement she said that Mayers was the person who had taken away the child and that, at the time, she had shouted "Murder!"

[9] On the next day, December 17, 1981, at the invitation of Sergeant Emmerson Moore, the appellant went to the District "C" police station to be interviewed by Sergeant Moore and Sergeant Wayne Cumberbatch. She was asked whether what she had told Station Sergeant Arthur was true and she said:

"No. I going tell you the truth now. I kill my child. Melvin made me do it." [3]

Under caution, she said:

"Melvin make me kill the baby."

She alleged that Melvin had put a knife to her throat and that she had strangled the baby with a blanket. He then took it away in a plastic bag.

[10] Later in the day, about 3.00 p.m., Station Sergeant Arthur and Sergeant Shepherd were in the office at the District "C" station where they saw the appellant in the company of her mother and sister. In the presence of these 4 persons, the appellant said:

"I is who kill the baby. Melvin put a knife to my throat and make me kill the baby. Then he gave me something to drink and I vomit it back up and he carry along the baby."

When asked by her sister why she had not told her about the matter, the appellant said that she was "frightened, weak and trembling". She was afraid that Mayers might have killed her.

[11] Station Sergeant Arthur saw the appellant on December 18, 1981. He told her that police searches had failed to find the baby and asked her if she could give any further information. He cautioned her and she again admitted killing the baby. On this occasion, however, the appellant said:

"You ain't going find it in the bush 'cause after I kill the baby I give it to Boy Boy boar hog and the boar hog eat it."

[12] Ivan Greenidge, alias "Boy Boy", lived near the appellant and did in fact have 4 pigs including two boars. When Station Sergeant Arthur searched Greenidge's pens, there was in fact no evidence of the remains of any child. [4]

[13] Eventually, Station Sergeant Arthur charged and cautioned the appellant for the murder of her baby. When charged, she gave yet another story. She now said:

"If wunnah look behind the paling wunnah going find the child because I throw it behind the paling."

[14] One of the written statements which the jury had for consideration was the one given on December 17, 1981 to Station Sergeant Moore. It was in these terms:

"Melvin went by my house Tuesday night this week about a quarter past seven. He was wearing a dungaree pants and a whitish shirt. He is my baby father and he come in the bedroom and after my sisters went along home Melvin tell me that he give me three hundred dollars to kill the baby when it was in my belly and I tek the money and I buy things for the house. He tell me tek the child and kill it now that he ain't want his wife to know that what she hear about the child is true and if ain't no child she ain't got no proof to carry him to court to divorce he. I tell he I ain't doing it and he grabble me, my nightie by my neck. Melvin then tek a brown handle knife from he back pocket, opened it and put it to my throat and tell me hold the baby and kill it now. I was frightened and didn't want to kill the baby and he say well I gine kill you. I was frighten because nobody didn't know that Melvin was at my house then. Because he left when one of my sisters was there, but he tell me he gine play he gine and catch the bus and gine come back. I was sitting down on the bed and Melvin tek up the child and give it to me and say, "Kill it now". He put back the knife to my throat and my head start spinning and I fall back on the bed. I had some alcolado on the bed and I put some in my hand and then to my nose and I catch myself then. I then tek the child blanket from Melvin because he tek it from round the child. I tek the blanket because Melvin tell me he gine kill me. I put the blanket round the child neck after rolling it and tie it round the neck. I pulled it for about three minutes and Melvin was looking at his watch tell me to stop now it dead and I stopped and shake it and it ain't holler or nothing. Melvin then take it and shake it and say it dead. The blanket was still round the child neck and he put it down inside a brown plastic bag that I had with some pads that I had used. He give me something to drink in a bottle and say it would help. I drink some and it come back up. Melvin then went out through the front door and I hear he walking below the house. Before he left he tell me to scream out when I think that he home. I sit down on the bed trembling and a long time after I shout [5] out for murder bring back my baby. I see a man named Ivan Greenidge and I was gine to tell he that Melvin got the baby and gone but I couldn't get the words come out. I only could shout for murder, murder. Melvin tell me that he gine blow up the house if I tell anybody that nobody wouldn't know the child dead."

[15] The prosecution's case was founded upon those several confessional statements of the appellant and the evidence of another woman whom we shall call "Joan Doe".

Joan Doe

[16] Joan Doe is related to the appellant. She is the mother of 3 children. By a remarkable twist of fate, Joan Doe claims to have given birth to a female child on December 16, 1981 – the very day on which the appellant reported to the police that her baby had disappeared. Joan Doe and the appellant were apparently both pregnant at the same time. Joan Doe said that her daughter assisted her with the delivery of her baby and a

midwife came only after the baby was born. Joan Doe had deposed at the preliminary inquiry that the name of her fourth child was "Andrea Nicole Gittens".

[17] At the trial, the appellant made an unsworn statement from the dock. She said:

"Sir, I did not kill my child. Melvin Mayers, the father, take away my child. I love my children and am willing to give a blood test. The night she was wearing blue booties and white clothes. Also I want the child produced to the Court."

[18] Both the preliminary inquiry and the trial itself proceeded on a basis bereft of affirmative proof of the actual death of the child. There was no compelling evidence that a death had occurred other than the several conflicting statements of the appellant. [6]

November 11, 2000

[19] In November 2000, a succession of events began to challenge the safety of the appellant's conviction. On November 11, 2000, Andrea Nicole Gittens, now approaching 19 years of age, turned up at the appellant's house and told the appellant that her own researches had revealed that she (the appellant) was her real biological mother.

[20] The appellant and Andrea sought the counsel of Mr. Freundel Stuart, Attorney-at-Law. He caused DNA samples of the appellant and Andrea to be taken at Spectrol Medical Laboratories Ltd ("Spectrol") on July 24, 2001. These samples were sent to Professor Karl Muench M.D., Professor of Medicine at the University of Miami's School of Medicine. He received them on July 26, 2001 and, on August 21, 2001, transmitted a letter and a Genetic Test Report to Spectrol for the attention of Mr. Darcy Evans who had taken the samples and sent them to Miami.

The DNA Evidence

[21] Armed with Professor Muench's letter and Genetic Test Report, which supported Andrea's "research", Mr. Stuart wrote to the Director of Public Prosecutions on November 26, 2001 enclosing the relevant documentation and requesting the Director "to revisit your files on this matter with a view to having this gross and painful miscarriage of justice corrected." He concluded:

"...it seems to me that the powers vested in your office by section 17 of the Criminal Appeal Act, Cap.113A of the Laws of Barbados can be activated to achieve this purpose."

[22] The Director has sought to adduce as fresh evidence in this Court an affidavit deposed to on February 12, 2002 by Mr. Darcy Evans, the [7] Managing Director of Spectrol together with the documents exhibited thereto and comprising:

(a) a copy of Professor Muench's letter of August 21, 2001 to Mr. Evans; and

(b) a copy of the Genetic Test Report.

[23] It is important that we set out the full content of the letter from Professor Muench. It states:

"Dear Mr. Evans Re: Gittens

On July 24, 2001 Ms. Carmelita D. Gittens, and Ms. Andrea N. Gittens, went to your office to submit buccal specimens for DNA testing designed to determine whether or not Carmelita is, indeed, the genetic mother of Andrea. Photographs, Barbados identification numbers, and birthdates routinely identified them. You sent the specimens to me by express courier on July 26. On July 27 I received and forwarded the specimens to express courier for laboratory studies at LIFECODES Corporation in East Lansing, Michigan, where the specimens were received in a sealed and intact package on July 31. Standard chain-of-custody procedures and records were maintained throughout the collection, transmission, and testing of the specimens.

Now I have received and reviewed the results of the testing, and I have enclosed a copy. The laboratory is certified, licensed, and reliable, and the probability for any error in the test results is well under one percent. That is, repeated testing in this or another qualified laboratory would yield the same results.

From the nine, independent DNA systems that were tested the laboratory calculated a cumulative maternity index of 582. That means that an ovum from Carmelita is 582 times more likely to contain the tested, required, maternal genes than is a random ovum from the Black population. If the before-testing probability of maternity is assumed to be 50%, then the after-testing probability of maternity is 99.83%.

In the absence of equivalent contrary information the laboratory evidence would compel the conclusion that Ms. Carmelita D. Gittens is the genetic mother of Ms. Andrea N. Gittens.

Sincerely yours,

Karl H. Muench, M.D. (Signed)

Professor of Medicine" [8]

[24] The Genetic Test Report is to this effect:

" RACE SPECIMEN ID SPECIMEN COLLECT

ALLEGED MOTHER: GITTENS, CARMELITA D BLACK 1055061 07/24/2001

CHILD: GITTENS, ANDREA N 1055062 07/24/2001

ALLEGED MATERNITY

SYSTEM MOTHER CHILD INDEX

DNA-PCR

1. D13S317(13q22-31) 12 12 2.25

2. D18S51(18q21.2) 12, 14 12, 23 4.46

3. D21S11(21) 30, 29 30, 27 1.54

4. D3S1358(3p) 14, 16 14, 17 2.12

5. D5S818(5q21-31) 13, 11 13, 12 1.00

6. D7S820(7q11.21-22) 8, 10 8, 10 2.13

7. D8S1179(8) 14, 15 14 1.50

8. FGA(4q28) 21, 24 21, 22 1.88

9. vWA(12p12-pter) 17, 19 17 2.96

CUMULATIVE MATERNITY INDEX = 582

PROBABILITY OF MATERNITY = 99.83%

Conclusion:

The alleged mother, CARMELITA D GITTENS, cannot be excluded as the biological mother of ANDREA GITTENS. Based on the above genetic testing results, the probability of maternity is 99.83% when compared to an untested random woman of the North American black population. (Prior Probability = 0.5)"

Enter Superintendent Greaves

[25] In addition to the DNA evidence, the Director has sought our leave to admit as fresh evidence an affidavit of Superintendent Morgan Greaves sworn to on December 14, 2001. In his affidavit, Superintendent Greaves deposes that on December 5, 2001, he attended upon the Director of Public Prosecutions and received certain documents and instructions.

[26] On December 6, 2001, Superintendent Greaves interviewed Joan Doe. Voluntarily and under caution, she gave a written statement which does not appear to be consistent with her evidence given 20 years ago on the depositions and at the trial of the appellant.

[27] We are constrained to exercise the greatest caution in respect of Superintendent Greaves' affidavit and the statements of Joan Doe. In the circumstances of this very unsavoury matter, where certain unfortunate events have occurred while these proceedings have been [9] pending, we are obliged to avoid, as far as is practicable in a small jurisdiction, references which may impair the due process of law and undermine the administration of justice.

[28] Suffice it to say that never again must it happen in this jurisdiction that, while a matter is sub judice in a court of this country, other proceedings directly and fundamentally pertaining to that very matter which is sub judice are commenced elsewhere and publicized in such a manner as might prejudice the outcome of the sub judice proceedings.

[29] For the reasons expressed in paragraphs 27 and 28, we shall make no further reference to Superintendent Greaves, his affidavit or the woman Joan Doe. We cannot receive the evidence of Superintendent Greaves as fresh evidence.

The decision which we have reached on Superintendent Greaves' affidavit effectively answers the second question posed by the Director. There remains, nevertheless, the DNA evidence which has been tendered through the affidavit of Mr. Evans. Its admissibility requires a consideration of the law.

The Law

[30] Section 29 of the Criminal Appeal Act, Cap. 113A deals with evidence at the hearing of an appeal. It provides, so far as is material to this Reference:

"29(1) For the purposes of this Part, the Court may, if it thinks necessary or expedient in the interests of justice –

(a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case;

(b) order any witness who would have been a compellable witness at the trial [10] to attend and be examined before the Court, whether or not he was called at the trial; and

(c) subject to subsection (3), receive the evidence, if tendered, of any witness.

(2) Without limiting subsection (1), where evidence is tendered to the Court under that subsection, the Court, unless it is satisfied that the evidence if received would not afford any ground for allowing the appeal, shall receive the evidence if –

(a) it appears to the Court that the evidence is likely to be credible and would have been admissible at the trial on an issue that is the subject of the appeal; and

(b) The Court is satisfied that though it was not adduced at the trial there is a reasonable explanation for the failure to adduce it.

(3) Paragraph (c) of subsection (1) applies to any witness, including the appellant, who is competent but not compellable....”

[31] In construing Section 29, we are of opinion that our first task is to apply subsection (2). We must determine whether or not to receive the fresh evidence of DNA profiling. In making that determination, the subsection obliges the Court to receive the fresh evidence if three conditions are satisfied:

(a) if it appears that the evidence is likely to be credible; and

(b) if it would have been admissible at the trial on an issue that is the subject of the appeal (Reference); and

(c) if the Court is satisfied that although it was not adduced at the trial, there is a reasonable explanation for the failure to adduce it. [11]

Thus, if these three conditions are met, the Court of Appeal must receive the evidence unless it is satisfied that the fresh evidence would not provide a ground for allowing the appeal. But, in view of the discretionary language in section 29(1), there is still the overriding discretion to receive the fresh evidence if the Court of Appeal “thinks it necessary or expedient in the interests of justice to receive it”.

Our duty is to assess and evaluate the fresh evidence and allow the appeal if, in our judgment, the fresh evidence combined with the original evidence might have caused the jury, or a reasonable jury properly directed, to acquit.

[32] The exhibits to Mr. Evans’ affidavit are powerful evidence. The DNA evidence and the conclusions of Professor Muench convince us that such evidence is likely to be credible and would certainly have been admissible at the trial if it had been available. Ms. Lorraine Alleyne, a senior Government Forensic Scientist, gave evidence in this Court and testified that DNA evidence would not have been available in April 1982. She went on to say that it was only in 1985 that the world became aware of this forensic phenomenon. Its very non-existence in 1982 affords a reasonable explanation for its absence from the trial.

[33] Ms. Alleyne also testified that she had reviewed the Genetic Test Report sent to Barbados by Professor Muench and she was of opinion that the maternity tests carried out were “based on good principles”. Significantly, she said that the 99.83% probability of maternity was acceptable, “Most courts in the U.S.A. accept 99.0% and above as satisfactory evidence.” [12]

[34] If the DNA evidence had been available in 1982, it would have been admissible at the trial on the issues of the maternity of Andrea Nicole and whether she was alive or dead. Those were also issues on this appeal (Reference).

[35] We think, therefore, that the evidence of DNA testing and profiling satisfies the three conditions of section 29(2) and clears the first hurdle. Moreover, our judgment is that the interests of justice make it necessary and expedient that this fresh evidence be admitted. The answer to question (i) is therefore in the affirmative.

The Safety of the Conviction

[36] Question (iii) asks our opinion as to whether the conviction of Gittens is safe or satisfactory. Section (4) of the Act enacts that this Court “shall allow an appeal against conviction where it is of opinion –

(a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case the verdict is unsafe or unsatisfactory...”

[37] The House of Lords recently had occasion to pronounce on the proper test to be applied by a Court of Appeal having received fresh evidence. Lord Bingham, delivering the leading speech in *R. v. Pendleton* [2001] U.K.H.L. 66 (as yet unreported), advised at paragraph 12:

“Where the Court of Appeal receives fresh evidence under section 23 of the 1968 Act it must assess the quality of the evidence and allow the appeal if it judges that the fresh evidence combined with the original evidence might have caused the jury, or a reasonable jury properly directed, to acquit. The test is what impact the evidence, if called at the trial, might have on the jury.” [13]

[38] Furthermore, Lord Bingham held that the case of *Stafford v. Director of Public Prosecutions* [1973] 3 All E.R. 762 had been correctly decided. *Stafford* has been a leading authority in this area of the law but it has come under criticism. In that case the accused were convicted of murder. Their case was referred to the Court of Appeal under section 17(1)(a) of the English Criminal Appeal Act by the Home Secretary. Leave

was given for fresh evidence to be adduced. After hearing the evidence, the Court of Appeal did not consider that the verdict of the jury should be set aside on the ground that it was unsafe or unsatisfactory. They dismissed the appeals. There was contention as to what was the proper test to be applied by a Court of Appeal.

The House of Lords held that it was not necessary to apply any particular test. The section left the matter to the judgment of the Court. The words "if they think fit" imported a discretion and judgment in the appeal Court. Thus, their Lordships held that, in fresh evidence cases, the court was not bound to decide what the jury might or would have done if they had heard the fresh evidence.

[39] Although his speech was only 12 lines, Lord Diplock, in his usual incisive and precise manner, put the question for members of an appellate Court succinctly. He said that the statute required "each one of us to ask himself the question: under all the circumstances of the case as it now stands in the light of the additional evidence, am I myself satisfied that the verdict of the jury was safe and satisfactory?"

In the Court of Appeal of England, Widgey LJ interpreted the phrase "unsafe or unsatisfactory" in *R. v. Cooper* (1968) 55 CAR 82. At page 86 he said: [14]

"That means that in cases of this kind the court must ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."

Subsequently, as the Lord Chief Justice, Lord Widgey reiterated the "lurking doubt" test as the proper test in *R. v. Lake* (1976) 64 CAR 172. Stafford was considered and applied by the Court of Appeal in *R. v. Byrne* (1989) 88 CAR 33.

[40] Section 14 of the Offences Against the Person Act, Cap.141 creates the crime of Infanticide. This section repealed and replaced section 2(2) of the Infanticide Act, Cap. 137 which was the statute in force in 1982. Section 14 is an almost identical reproduction of the former section 2(2). It is as follows:

"Where a woman by any wilful act or omission causes the death of her child being under the age of 12 months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not being fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she is guilty of infanticide, and may be dealt with and punished as if she had been guilty of manslaughter of the child."

[41] It seems to us, as Mr. Stuart submitted, that the jury in 1982 must have believed that a newly-born child had died and its death was caused by the appellant whose mind was disturbed. The fresh evidence now does not support the conclusion to which the jury came. The conviction was based on an apocryphal story. The evidence in 1982 was that the child had died. Today's evidence, the result of the advance of modern science, is that that child is alive. [15]

[42] In the light of the fresh DNA evidence therefore, it is impossible to be sure that the appellant's conviction is safe under all the circumstances. We therefore answer question (iii) in the negative. It follows that the answer to question (iv) is in the affirmative. We direct that the conviction be quashed and the sentence set aside.

Retrial

[43] The interests of justice will not be served by our ordering a retrial. A retrial is not to be ordered as a matter of course. Such an order should be made only if the interests of justice so dictate. In considering the interests of justice, due regard must be paid to the interests of the prosecution and appellant equally and the interests of the public of Barbados.

[44] When a retrial is ordered, "the interest of justice that is served is the interest of the public (in a particular country) that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury." – per Lord Diplock in *Reid v. R.* [1971] 27 W.I.R. 254 at 258. See also *The State v. Sattaur and Mohamed* [1976] 24 W.I.R. 157.

[45] No list exists of the factors to be weighed in determining whether to order a retrial. It is not desirable that there should be such a list since each case is likely to turn upon its own peculiar facts. However, it is undoubted that the seriousness of the offence and its prevalence, the complexity or otherwise of the trial, expense, the likelihood of a second trial being an ordeal for the appellant, the length of time that will have elapsed between the date of offence and the retrial, the quality of the evidence and the strength or [16] weakness of the prosecution's case at the trial are some of the factors to be taken into account.

[46] In this case, key witnesses are no longer available; over the course of the last 20 years events which were fresh in April 1982 will almost certainly have faded away by the passage of time itself; there would be the inherent and, probably insuperable, difficulty of rehearsing events which happened two decades ago. Most of all, the DNA evidence would almost inevitably destroy the prosecution's case and certainly be a strong incentive for the Director of Public Prosecutions to enter a *nolle prosequi* in the particular circumstances.

[47] We hasten to add that no human system is or can be expected to be perfect. No system is better than its human input. And nothing that has happened in this unfortunate case and nothing that we have said should be interpreted as undermining the primacy of trial by jury. It remains a fundamental of our constitutional arrangements, hallowed by traditional usage in the criminal justice process of Barbados.

[48] Jury trial is a creature of statute – the Juries Act, Cap.115B. So too, is the Court of Appeal. Our powers are derived from and confined to the Criminal Appeal Act, Cap.113A. The powers which we have exercised to quash the conviction in this matter are conferred upon us by Parliament and we are directed by the statute to allow the appeal (Reference) only if we think the conviction to be unsafe or unsatisfactory. We

are not to determine guilt or innocence. That function devolved upon the jury. But, as a Court of review, we are empowered to adjudicate upon the safety or otherwise of a conviction. We are not to usurp the function of the jury as the body charged by law to resolve issues of fact and determine guilt or [17] innocence. Our statutory powers are intended to arm the Court of Appeal with powers sufficient to rectify miscarriages of justice.

As Lord Bingham remarked in *Pendleton* (supra) at paragraph 17:

“The Court of Appeal is entrusted with a power of review to guard against the possibility of injustice but it is a power to be exercised with caution, mindful that the Court of Appeal is not privy to the jury’s deliberations and must not intrude into territory which properly belongs to the jury.”

[49] A miscarriage of justice of immense proportions has been rectified. We can, as ordinary human beings, only wonder at the magnitude of the psychological trauma, the humiliation and no doubt ridicule, stress and sense of shame that engulfed the appellant during the past 20 years. A consciousness of the stigma of a criminal conviction would have been an unwelcome constant companion during her waking hours. It has been fortuitous that she was not convicted of murder and that the compassion of the trial judge saved her from imprisonment.

A woman denied the joys of motherhood for 20 years may yet find comfort in some words of Shakespeare:

“Time’s glory is to calm contending kings;

to unmask falsehood, and bring truth to light.” –

The Rape of Lucrece.

[50] In all the circumstances of this case we think it appropriate that the appellant be awarded costs certified fit for two Attorneys-at-Law, to be agreed or taxed. [18]

Chief Justice

Justice of Appeal Justice of Appeal